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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

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**No. 565**

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KITTY HAWK DEVELOPMENT CO., a Corporation,
*Appellant,*

*v.*

THE CITY OF COLORADO SPRINGS, COLORADO,
a municipal corporation, *Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF COLORADO

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## MOTION TO DISMISS

Appellee, City of Colorado Springs, moves to dismiss the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the grounds that (1) no substantial federal question is presented by this appeal, (2) the judgment of the Supreme Court of Colorado rests on an adequate non-federal basis, and (3) the federal question sought to be reviewed was not passed on by the Supreme Court of Colorado.

### Question Presented

Was a subdivider of land located outside a city's boundaries deprived of constitutional rights when he paid

the city $25,378.08 six years ago for furnishing city water, sewer and other services to comply with legislative requirements for annexation and subdivision approval?

## Statement of the Case

This is an appeal from a Judgment of the Supreme Court of Colorado which held that the Appellant, a land subdivider, was not entitled to the return of fees paid by way of agreement some six years previously, for the furnishing of city utilities and services to a subdivision upon annexation to the city. 392 P. 2d 467 (Colo. 1964), Jurisdictional Statement 4A.[1]

The Kitty Hawk Development Co., Appellant, was incorporated in 1954 for the sole and exclusive purpose of acquiring a 100 acre tract of land in El Paso County, Colorado (R. 94). The tract was situated outside the corporate limits of the City of Colorado Springs, a charter city under Article XX, Section 6 of the Colorado Constitution. It was Appellant's original intention that the subdivision remain outside the City limits. (R. 98)

The president and major stockholder of the Appellant corporation was a seasoned businessman with many years of practical experience in the field of real estate and land subdivision. (R. 114). Purchase of the land for subdivision purposes was made at a cost of $442,215.00 after consideration of factors such as the costs for street improvements, the availability of water, sewer and other utilities and the potential market area. (R. 115, 116).

Appellant acquired the property under a contract contingent upon arrangements being completed with the City of Colorado Springs to furnish utilities. (R. 37).

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[1] The Jurisdictional Statement is referred to herein as "J.S."; and the Transcript of Record in the Supreme Court of Colorado as "R."

Under the agreement the seller was to apply to the City[2] and County officials for plat approval of the subdivision and the development company was to pay all the expenses. The contract as amended indicated that the purchaser was to use due diligence to have the property legally and properly zoned, the plat approved and arrangements completed for the installation of utilities with the City of Colorado Springs but in the event that the purchaser was unable to obtain the platting, zoning and arrangements for utilities, the contract was to become null and void and payment made thereunder returned to purchaser. (R. 37, 38, 39)

After approval of the Kitty Hawk Subdivision by the Planning Commission and the Board of County Commissioners of El Paso County (R. 97, 98), Appellant was advised that city water and sewer services were not available for the subdivision outside the City limits. The City was not a public utility for the furnishing of water and sewer services and had no obligation to provide such services outside the City. However, Appellant was advised that the tract could be annexed to the City, and that upon annexation, the subdivision would be entitled to all City facilities and services. (R. 121, 124, 125, 148, 149)

City ordinances with which the subdivision would have to comply included the electrical, plumbing, building and zoning codes (R. 149, 150) and the subdivision ordinance.

City of Colorado Springs Ordinance No. 1987, known as the Subdivision Ordinance, provides for the platting

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[2] Colo. Rev. Stats., 1953, §§ 139-59-12, 139-59-13, authorizes a municipal planning commission to control a major street plan for land lying within three miles of the corporate limits. Colorado Springs Ordinance 1987, known as the Subdivision Ordinance, implements this enabling legislation. The requirement as to the major street plan constituted the only essential contact of the City with Appellant outside the City limits (R. 102, 103, 104, 153, 163).

and layout of subdivisions, street systems, installation and control of public utilities, safety facilities, the acquisition of desirable public space and the proper distribution of population, all to promote the health, welfare and safety of the people. Its jurisdiction is limited to the area within the corporate limits of the City except as to major street plans. (R. 8, 9)

Section 2-E of the subdivision ordinance provides that the owner of land in a subdivision shall allocate eight per cent of the subdivision exclusive of streets and alleys for parks, playgrounds, schools, recreational or similar public purposes at such location as designated by the City or at the option of the City to pay to it an amount equal to eight per cent of the appraised value of the land. (J.S. 39a). This formula as to the appraised value was the method used to compute the amount paid to the City for water and sewer services.

The status of Appellant and Appellee at this point was succinctly stated by the Supreme Court of Colorado:

"(1) The Plaintiff was in need of water and sewer services from the city, but preferred not to annex to the city;

"(2) Plaintiff could obtain city water and sewer services only in the event of annexation of the Kitty Hawk Subdivision to the city;

"(3) The city conditioned annexation upon payment by the Plaintiff to the city of an amount equal to eight per cent of the appraised valuation of the subdivision;

"(4) The Plaintiff agreed to annex to the city and to make the payment required by the City so that it might receive water and sewer services;

"(5) Water and sewer services were supplied Plaintiff upon annexation and the payment of $25,378.08." (J.S. 10a, 11a).

The Board of Directors of the Kitty Hawk Development Company cognizant of and fully understanding the conditions upon which annexation could be accomplished and the resulting municipal service and advantages made available caused the then owner of the tract to initiate the petition for annexation. (R. 101, 108, 132-135, 149-152, 204, 277-283).

After notice and other preliminary proceedings for annexation, Ordinance No. 2204 was adopted by Colorado Springs on March 8, 1955. This ordinance of annexation, together with the annexation plat, was subject to the conditions, agreed to by Appellant, that the subdivision comply with all of the ordinances of the City including those relating to the subdivision of land. Accordingly, when the annexation was consummated by Ordinance No. 2204, it was with the understanding that Kitty Hawk Subdivision would comply with all city ordinances and would receive all municipal benefits including city water, sewer, other utility and municipal services.

The plat of the Kitty Hawk Subdivision was approved by the City on March 22, 1955. This plat, as did the annexation plat and the annexation ordinance, contained statements that the subdivision was subject to all ordinances of the city relating thereto and the two plats made direct reference to th[redacted]ivision ordinance.

After the approv[redacted]e subdivision plat, land of the Kitty Hawk Subdivision was appraised at $317,226.50, an amount almost $125,000.00 less than Appellant's purchase price. Appellant then on August 12, 1955, paid to the City the sum of $25,378.08 or eight per cent of the appraised value of the land.

The payment of this fee had been agreed to by Appellant to receive the city water and sewer services. The amount was determined by the formula prescribed in the

Subdivision Ordinance and is consistent with the estimated amount which the Board of Directors of Appellant agreed to pay in order to secure annexation and acquire the needed water and sewer services.

As stipulated by the parties, annexation and subdivision requirements being fully complied with, water and sewer lines and other utilities were installed; streets built and other municipal services, including fire and police services, furnished. Houses have now been built and sold on a substantial portion of the lots in the subdivision.

Appellant after accepting all the benefits of annexation which they freely sought, contracted for and acquiesced in for approximately six years, then brought this action for return of the fee paid with interest.

The Supreme Court of Colorado dismissed the complaint saying it was not necessary to determine the constitutionality of the subdivision ordinance as Appellant was precluded by other matters appearing in the record from recovering. In a comprehensive opinion the Court found:

(1) that the City was under no obligation to sell or furnish water or sewer services outside its corporate limits;

(2) if it elected to do so it acted in a proprietary capacity with a resulting contractual relationship;

(3) no governmental power was bargained for, nor was any constitutional right surrendered;

(4) the law of the State and the State constitution do not prohibit the imposition of conditions by a municipality upon one seeking annexation.

The Court stated: "We see no reason, legal or moral, why the Plaintiff should have all of the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive

back from the City a portion of the consideration which it gave in order to obtain these services, which the City was under no constitutional or statutory obligation to furnish." (J.S. 12a, 13a).

## ARGUMENT

### I. No Substantial Federal Question Is Presented

A. *The Fourteenth Amendment Is Not Violated By Provisions Of The Constitution or Law Of Colorado Relative To Powers Of Political Subdivisions.*

In the absence of constitutional restrictions (*Williams* v. *Eggleston*, 170 U.S. 304, 310, *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 524) the legislature has absolute control over the number, nature, duration and extent of powers conferred upon political subdivisions and the territory over which they shall be exercised. The state is supreme as to the powers of its political subdivisions and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179. A long line of decisions of this court reaffirms this principle. cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343.

1. *There is No Constitutional Right To Annexation To City.*

Municipal corporations are political subdivisions of the state created for exercising such powers as may be delegated to them. Territory to be included within a city is a discretionary function of the governing body. *Kelly* v. *Pittsburgh*, 104 U.S. 78, 81.

Colorado law permits a contiguous area to be annexed

upon application to the municipality by the owners of more than 50 per cent of the area, together with the consent of more than 50 per cent of the landowners residing in the area. (Colo. Rev. Stats. 1953, § 139-11-3). Annexation is thus initiated by the people who seek annexation. However, as stated by the Supreme Court of Colorado "A municipality is under no legal obligation in the first instance to annex contiguous territory, and may reject a petition for annexation for no reason at all." (J.S. 13a.)

This construction of state law is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78; *Great Northern Ry. Co.* v. *Sunburst O. & R. Co.*, 287 U.S. 358, 362.

2. *There Is No Constitutional Right To Receive City Water.*

A municipality is not bound to furnish water or sewer services to everyone who demands it. As a general rule a municipality which engages in furnishing water to its inhabitants has a governmental discretion as to the limits to which it is advisable to extend its mains, and unless such discretion is abused, its decision in the matter is determinative. *Brasier* v. *Lincoln*, 159 Neb. 12, 65 N.W. 2d 213 (1954), cert. den. 348 U.S. 926.

Likewise a city cannot be compelled to supply water to nonresidents outside its corporate limits in the absence of contract or of a course of action from which it could be found that the municipality had held itself out as a public utility in an entire area. See the array of authorities collected at 48 A.L.R. 2d 1222, 1230.

Under Colorado law (Colo. Rev. Stats. 1953, §139-32-1 (39), cities have power to supply water from their water systems to consumers outside the corporate limits. How-

ever, the city is under no obligation to sell or furnish water or sewer services to anyone outside its corporate limits, and if the city elects to do so, it acts in a proprietary capacity, and the relationship entered into between a city as a supplier and users is purely contractural. *City of Englewood* v. *City and County Denver*, 123 Colo. 290, 229 P. 2d 667 (1951); *City of Colorado Springs* v. *P.U.C.*, 126 Colo. 265, 248 P. 2d 311 (1952); *Lee* v. *City of Colorado Springs*, 136 Colo. 248, 315 P. 2d 822 (1957), cert. den. 355 U.S. 955; *City of Fort Collins* v. *Park View Pipe Line*, 139 Colo. 119, 336 P. 2d 716 (1959).

This construction of the Colorado law on municipal powers is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78; *Great Northern Ry. Co.* v. *Sunburst O. & R. Co.*, 287 U.S. 358, 362.

Accordingly, Appellant has no constitutional right to annexation to the City of Colorado Springs, nor to receive extraterritorily the water and sewer services of the City of Colorado Springs. As stated by the Supreme Court of Colorado "No governmental power was bargained for here, nor was any constitutional right surrendered, for plaintiff had no constitutional or statutory right to receive water and sewer services from the defendant." (J.S. 11a, 12a).

## II. Judgment Rests Upon Adequate Non-Federal Basis

Appellant as an owner of land located outside the city had no constitutional or statutory right to receive water and sewer services from the City. The City likewise had no obligation to annex the land nor to furnish it with water and sewer services.

As a charter city under Article XX of the Colorado Constitution, Appellee possessed full home rule powers. Acting in a proprietary capacity if electing to furnish water and sewer services outside its corporate limits, under Colorado law, the City as supplier and the user enter into a contractual relationship. *City of Englewood* v. *City and County of Denver*, 123 Colo. 290, 229 P. 2d 667 (1951); *City of Colorado Springs* v. *P.U.C.*, 126 Colo. 265, 248 P. 2d 311 (1952); *Lee* v. *City of Colorado Springs*, 136 Colo. 248, 315 P. 2d 822 (1957), cert. den. 355 U.S. 955; *City of Fort Collins* v. *Park View Pipe Line*, 139 Colo. 119, 336 P. 2d 716 (1959).

The Supreme Court of Colorado finding no compulsion on either Appellant or Appellee as to annexation or the furnishing of city services, found that the Appellant wanted water and sewer services and the Appellee required Appellant to agree to annex its property to the city to comply with the city's subdivision and all other ordinances. The Court concluded "We see no reason, legal or moral, why the Plaintiff should have all the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive back from the City a portion of the consideration which it gave in order to obtain these services, which the city was under no constitutional or statutory obligation to furnish." (J.S. 12a, 13a).

With the contract relationship present, the Court found it unnecessary to determine any constitutional question. In so ruling, it followed precedent from Colorado. *State ex rel. Cruse* v. *American Can Co.*, 117 Colo. 312, 186 P. 2d 779 (1947). The Court also followed the policy stated by this Court in *District of Columbia* v. *Little*, 339 U.S. 1, 3: "This is therefore an appropriate case in which to apply our sound general policy against deciding consti-

tutional questions if the record permits final disposition of a cause on non-constitutional grounds."

Disposing of Appellants "business compulsion" theory and finding an adequate non-federal basis for its judgment, the Court stated "the only 'compulsion'—legal or otherwise—serving to motivate Morrison and his associates was the desire to make a profit on the Kitty Hawk Subdivision". (J.S. 12a).

*Union Pacific R. Co.* v. *Public Service Commission*,[3] *Staub* v. *City of Baxley*,[4] *Armstrong* v. *United States*,[5] *Frost & Frost Trucking Co.* v. *Railroad Comm'n. of California*,[6] and other cases[7] and authorities cited by Appellant relative to "unconstitutional conditions" clearly are not applicable to this case.

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[3] 248 U.S. 67, concerned the validity of a charge by the Public Service Commission of Missouri for a certificate authorizing the issuance of bonds secured by a mortgage on the lines of the foreign corporation and involved interstate commerce.

[4] 355 U.S. 313, invalidated an ordinance which required a permit to be issued within the discretion of the city before soliciting membership for any organization, and involved an infringement upon the freedom of speech.

[5] 364 U.S. 40, concerned materialmen's liens under state law furnished a contractor building boats for the United States and involved the transfer of title upon default, and the sovereign immunity of the United States against materialman's liens.

[6] 271 U.S. 583, concerned the power to compel by legislation a private carrier to assume the duties and burdens of a common carrier for the privilege of using California highways and affirmed the interpretation of a state statute by the state court.

[7] *Pioneer Trust and Savings Bank* v. *Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961); *Rosen* v. *Village of Downers Grove*, 19 Ill. 2d 448, 167 N.E. 2d 230 (1960); *Miller* v. *Beaver Falls*, 368 Pa. 189, 82 A. 2d 34 (1951); and *Kelber* v. *City of Upland*, 155 Cal. App. 2d, 631, 318 P. 2d 561 (Dist. Ct. App. 1957) also cited by Appellant involving enabling powers are similarly not applicable in this contract situation. Cases dealing with subdivision regulations are collected in the Annotation at 11 A.L.R. 2d 525. In this case enabling power is present (Article XX, Constitution of Colorado, see *City of Denver* v. *Board of Commissioners of Arapahoe County*, 113 Colo. 150, 156 P. 2d 101 (1945) and the funds were paid into a Special Account known as Parks and School Property.

In the language of Appellant ". . . if a constitutional right is involved, the surrender of it cannot be made a condition to governmental action." (J.S. 13, 14). But here no constitutional right was surrendered. The Supreme Court of Colorado expressly found "nor was any constitutional right surrendered". (J.S. 11a). From Appellant's attempt to explain away *Stephenson* v. *Binford*, 287 U.S. 251, it can be seen that if the surrender of a constitutional right is not involved, the doctrine does not apply.

Moreover, the assailed provisions are not ends in and of themselves but means to the legitimate end of promoting the health, welfare and safety of the public by regulating the boundaries of the City and the availability of its services. This Court has long upheld regulations governing growing metropolitan areas as a valid exercise of the police power. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365; *Welch* v. *Swasey*, 214 U.S. 91; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590.

## III. Federal Question Was Not Passed on by Colorado Supreme Court

In the words of the Colorado Supreme Court ". . . it is not necessary under the circumstances of this case to determine the constitutionality of Section 2E(1) of the City's Subdivision Ordinance, since the plaintiff is precluded by other matters appearing in the record from recovering that which is sought." (J.S. 10a).

This court has consistently followed the rule laid down in *Bolling* v. *Lersner*, 91 U.S. 594, 595, "We cannot reexamine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as

rendered." See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298; *Wilson* v. *Cook*, 327 U.S. 474, 480; *Herb* v. *Pitcairn*, 324 U.S. 117, 126.

## Conclusion

For the reasons given above, the appeal should be dismissed as (1) no substantial federal question is presented, (2) the judgment of the Supreme Court of Colorado rests on an adequate non-federal basis, and (3) the federal question sought to be reviewed was not passed upon by the Supreme Court of Colorado.

Respectfully submitted,

F. T. Henry,
*City Attorney,*

Louis Johnson,
*Assistant City Attorney,*
*City of Colorado Springs*
*501 Mining Exchange*
*Building,*
*Colorado Springs,*
*Colorado.*

Charles S. Rhyne,
Brice W. Rhyne,
Alfred J. Tighe, Jr.,
*Rhyne & Rhyne,*
*400 Hill Building,*
*Washington 6, D. C.*

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